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PROTECTING CONSUMERS SINCE 1975

December 10, 2020

VIA ELECTRONIC FILING

The Honorable Jocelyn Boyd
Chief Clerk/Executive Director
The Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29210

RE: Docket 2020-125-E
Application of Dominion Energy South Carolina, Inc. for Adjustment of Rates/Charges
Response to Motion to Strike

Dear Ms. Boyd:

Please find enclosed for filing, the Department's Response to Dominion's Motion to Strike testimony of Scott Hempling. As indicated on the Certificate of Service, I am serving all parties of record via electronic mail.

Regards,

Roger Hall, Esq.
Assistant Consumer Advocate

Enclosures
CC w/ Enclosure: Parties of Record (via email)

STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION
DOCKET NO. 2020-125-E

IN RE:	)
	)
APPLICATION OF DOMINION ENERGY SOUTH CAROLINA, INCORPORATED FOR ADJUSTMENT OF RATES AND CHARGES	)

RESPONSE TO MOTION TO STRIKE TESTIMONY OF SCOTT HEMPLING

The South Carolina Department of Consumer Affairs ("Department") submits this response to Dominion Energy South Carolina's ("DESC") Motion to Strike testimony of Scott Hempling. Having asked this Commission to approve a revenue requirement of $2.3 billion, DESC now seeks to block testimony offered to help the Commission decide whether that $2.3 billion is reasonable.[1] The Commission is afforded discretion in its review of evidence during a rate hearing and is not required to strike testimony as DESC asserts. Mr. Hempling's testimony addresses complex areas of rate regulation and he necessarily discusses the regulatory framework relevant to his testimony Further, the South Carolina Rules of Evidence allow expert testimony on the ultimate issues to be decided by the Commission and Mr. Hempling's testimony is not prohibited by South Carolina law. The Commission is the fact-finder in this matter and serves as a panel of experts; therefore, it is authorized and obligated to consider all properly submitted, relevant evidence that may assist it in deciding if DESC's requests are reasonable. Therefore, the Commission should deny the motion.

[1] DESC's Motion to Strike Testimony of Scott Hempling (Dec. 2, 2020), seeking to delete pages 9 to 26.

I. Commission Discretion in Reviewing Testimony

DESC's motion shows a lack of respect for the Commission's ability to review testimony without prejudice and threatens "reversible error" in an attempt to suppress Mr. Hempling's testimony. The South Carolina Supreme Court has found that the trial court, and likewise the South Carolina Public Service Commission has great discretion in admitting evidence and its decision will stand unless there is an abuse of discretion. "[T]he admission of evidence is a matter addressed to the sound discretion of the trial judge and absent clear abuse of discretion amounting to an error of law, the lower court's ruling will not be disturbed on appeal…" Hofer v. St. Clair, 298 S.C. 503, 513 (1989). This same discretion extends to reviewing a motion to strike as "[i]t is well settled that a motion to strike is addressed to the sound discretion of the trial court." Totaro v. Turner, 273 S.C. 134, 135 (1979).

As will be discussed further below regarding bench trials in which there is no jury, "…where the factfinder and the gatekeeper are the same, the court does not err in admitting the evidence…" In re Salem, 465 F.3d 767, 777 (7th Cir. 2006). In this case, it would not be an abuse of discretion to deny DESC's motion and admit Mr. Hempling's full testimony.

II. Mr. Hempling's Testimony is Not Legal Pleading

a. Citing Legal Principles Does Not Create Legal Opinion

Contrary to DESC's mischaracterizations, Mr. Hempling's testimony is not legal pleading; it offers background and context for the policy framework relevant to his testimony and DESC's requests, which are factual matters. Part II.B of Mr. Hempling's testimony is entitled "DESC fails to show that its costs are prudent." No wonder DESC seeks to strike it. Prudence is the central standard for cost recovery and an ultimate issue in this case. To assist the Commission

in understanding the basis for his testimony and in applying the standard to DESC's requested $2.3 billion, Mr. Hempling provides regulatory principles that have been cited by courts:[2]

- Prudence requires "[c]arefulness, precaution, attentiveness, and good judgment"; "sagacity or shrewdness in management of affairs"; as well as "skill or good judgment in the use of resources."

- A prudent utility "operate[s] with all reasonable economies"; incurs the "lowest feasible cost." It uses "all available cost savings opportunities," and it deploys "all available professional tools objectively and competently."

- A prudent utility has "lowest reasonable rates consistent with the interests of the public and the utilities."

- A prudent utility conducts a "thorough, complete, and accurate evaluation of alternatives."

DESC also moves to strike principles that should guide any conscientious commission in its duty to hold utilities accountable. The principles, especially relevant when addressing the company's first rate case since the V.C. Summer troubles, are:

- "Effective regulation replicates the pressures of competition."[3]

- "Without regulatory standards—along with consequences for not meeting those standards—a company protected from competition lacks incentive to perform as if subject to competition."[4]

- "If a competitive company acts imprudently (or imprudently fails to act), it incurs costs its competitors don't incur; or, it fails to achieve savings its competitors achieve. The equilibrium market price will reflect the lower costs of the prudent competitors. Because the imprudent seller cannot charge more than the market price without losing customers, that seller cannot recover its excess costs. Knowing of this inevitable consequence, companies in competitive markets strive toward prudence."[5]

There is no basis for depriving the Commission of these principles. That these common-sense principles are cited by courts does not convert Mr. Hempling's testimony into legal pleading.

[2] Hempling Direct Testimony at 10-11.
[3] Id. at 12:12.
[4] Id. at 12:4-6.
[5] Id. 13:1-6.

All policy exists within legal boundaries. Those boundaries are set by statutes and constitutions, then interpreted by courts. That Mr. Hempling takes the time to identify the boundaries does not make his testimony "legal"; rather, it demonstrates his respect for them. Further it helps the Commission remain within those boundaries and proceed confidently in applying the principles to DESC's requests. An expert witness who happens to have legal knowledge is not required to leave that knowledge behind, merely to avoid motions to strike like this one. This testimony provides context and background that will help the Commission use its discretion and judgment when assessing the reasonableness of DESC's costs. Therefore, it should be admitted for the Commission's consideration.

b. Citing a Lack of Prudency Evidence is Not Legal Opinion.

A standard purpose of intervenor testimony is to critique the applicant's testimony. In Part II.B.2 of this testimony, Mr. Hempling does exactly that: he digests each witness's testimony, then explains how it fails to contain any evidence of prudence.[6] Nothing in that discussion resembles legal pleading. We can understand why DESC would want to keep this critique from the Commission, but there is no legal basis for doing so.

Given the rebuttable presumption of prudence- a policy typically applied by commissions in utility rate cases- Mr. Hempling rightfully addresses the policy in the context of DESC's failure to establish prudence. Mr. Hempling first describes the presumption as "deferential to the utility, costly to the customers."[7] He criticizes it as rooted in an illogical assumption: that "a company protected from competition will be motivated to act as if it were subject to competition."[8] He then gives six reasons why the Commission should modify the presumption in this proceeding:

[6] Id. at Part II.B.2 (pp. 15-16).
[7] Id. at 17:12.
[8] Id. at 18:10-11.]

- SCE&G has suffered a "loss of trust" resulting from its "lack of transparency."[9]

- This proceeding is SCE&G's first rate case since becoming subordinated to and controlled by Dominion Energy.[10]

- "[N]one of Dominion Energy's ten witnesses offers any evidence that it has corrected the SCE&G and SCANA practices that caused the Commission, the State and its citizens so much concern."[11]

- "A presumption of prudence is especially inappropriate for a utility that faces little competition."[12]

- SCE&G "has failed to take the actions most other utilities have taken to expose their generation costs to competition at wholesale."[13]

- "[A] South Carolina utility increases its profit by increasing its rate base--by adding to its physical assets, financed with its own capital expenditures. The higher the capital expenditure, the higher the rate base; the higher the rate base, the higher the profit. That those capital expenditures are subject to Commission review does not change the utility's incentive and opportunity to increase the rate base—especially if its actions to expand the rate base enjoy a presumption of prudence."[14]

Mr. Hempling recognized that the Commission might consider itself constrained to apply the presumption, due to state Supreme Court decisions that he forthrightly described. He therefore offered a "surgical" solution: before making customers pay $2.3 billion annually to a company that offered no evidence of prudence, require DESC to provide "objective facts showing that the DESC's costs are the lowest feasible costs."

Mr. Hempling thus did precisely what expert witnesses should do: recognize the legal constraints, then offer alternatives that respect those constraints.[15] If DESC believes Mr.

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[9] Id. at 19:10 (quoting Commission order).
[10] Id. at 19:8.
[11] Id. at 19:11-13.
[12] Id. at 19:16-17.
[13] Id. at 19:18-19.
[14] Id. at 20:13-19.
[15] *See*, *e.g.*, DESC's direct testimony submitted by Dr. Vander Weide at 5:1-5, citing and applying Bluefield Water Works v. Public Service Comm'n of W. Va., 262 U.S. 679, 692 (1923) and Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944).

Hempling's proposal inconvenient or unlawful, it can cross-examine him about it and address the issue in its proposed order. There is no basis for striking the testimony.

In any event, the presumption of prudence is itself a matter of policy. As Mr. Hempling points out, neither our Supreme Court nor any other court has connected the presumption to a statutory or constitutional provision. The Commission therefore is free to interpret our state statutes as allowing Mr. Hempling's approach.

c. Legal Opinion Testimony is Allowed in Complex Matters and to Address Ultimate Issues

The Department does not agree with DESC's contention that Mr. Hempling's testimony is providing opinions on "legal arguments" or "legal conclusions". However, assuming *arguendo*, that it is, the opinions are not required to be excluded under South Carolina law or numerous legal precedents from across the country, including prior precedent from the Commission.

As noted by DESC, Rule 702 of the South Carolina Rules of Evidence allows testimony in the form of expert opinion if "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. Rule 704 further provides "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Mr. Hempling's testimony is relevant to the ultimate issues in the case and the Commission will not be prejudiced by reviewing it.

DESC contends it is "beyond contestation" that an expert may not testify on issues of law. This is not true. DESC cites Dawkins v Fields to support its misleading argument. The Dawkins decision relates to a summary judgment order and an expert affidavit and is not relevant here. Summary judgment is granted when there are no issues of material fact. Therefore, any motion seeking summary judgment will be primarily legal. Those opposing summary judgment need to show material facts exist such that summary judgment is not appropriate and the court should

continue the case. In Dawkins, to support its opposition to summary judgment, the respondent submitted an affidavit from a law professor, which the court found, rather than facts, contained "an opinion on the law which improperly invaded the trial court's own role to decide the summary judgment motion." Dawkins v. Fields, 354 S.C. 58, 63-64 (2003). Importantly, the court did not find it "beyond contestation" that this type of testimony was inadmissible, but rather stated it was "in general." Id. at 66.

In State v. Morris, the South Carolina Supreme Court distinguished Dawkins and found it appropriate to allow an expert witness to testify regarding legal issues. The court noted Dawkins "differs substantially from the expert testimony cases relied upon by the party seeking to exclude expert testimony." State v. Morris, 376 S.C. 189, 205 (2008). The expert in the case testified regarding corporate and securities laws, including legal definitions and whether certain statements would violate securities laws. The expert was presented with a series of hypotheticals and testified if certain actions would be illegal in those situations. These are clearly issues of law. However, the Supreme Court found "[a]lthough this testimony arguably involved the ultimate issue in the instant case, this case required the jury to analyze facts and circumstances as they existed in a complex business environment, and the trial court determined that expert testimony would assist the jury in making its determinations." Id.

The issues before the Commission are complex, as they were in State v. Morris, and Mr. Hempling's testimony will serve to assist the Commission in making its final determination. Further, courts have distinguished the treatment of legal opinions from experts during jury trials from those made in bench trials, as concerns that might exist in a jury trial do not exist when a

judge determines both the facts and the law.[16] Likewise, these concerns do not exist in a hearing before the Commission.

> In a bench trial… the Court is well-prepared to identify expert evidence that operates to inform the Court of the circumstances of the complex transaction at issue…and distinguish that evidence from expert opinions that invade the province of the Court or offer interpretations of the law that go to the heart of the legal issues in this case

WFC Holdings Corp. v. United States, 2010 U.S. Dist. LEXIS 24721 (D. Minn. 2010)

In that case, the United States contended the experts were providing legal opinions that should be excluded; however, the court concluded- "[g]iven the complex facts underlying WFC's transaction with Charter and Lehman Brothers, and the Court's dual role as gatekeeper and factfinder in this case, wholesale exclusion of the reports or testimony of either party's experts is unwarranted." Id. Similarly, in a case, where an expert testified regarding reasonableness and good faith determinations, the court found the plaintiff's arguments that the expert's opinions were "inadmissible because they are legal in nature" to be "unfounded" and further found "where the court is acting as the trier of fact, the dangers which can be presented by such 'ultimate issue' testimony are minimal if not nonexistent." Martin v. Ind. Mich. Power Co., 292 F. Supp. 2d 947, 959 (W.D. Mich. 2002).

As the Commission has often noted, it "sits as a trier of fact akin to a jury of experts" and "[t]he role of the jury is to weigh the evidence."[17] "Accordingly, this Commission is entitled to hear testimony and give that testimony whatever weight it deems appropriate during the course

[16] Juries resolve questions of fact and are instructed on the law by judges; therefore, a jury could potentially be influenced by witness testimony on legal issues. Notably, both Green v. State and Kirkland v. Peoples Gas Co., cited by DESC, involved appeals from jury trials.

[17] PSC Order 2009-104(A), Docket 2008-196-E, page 112, citing Hamm v. SCE&G, 309 S.C. 282, 422 (1992) and South Carolina Highway Department v. Townsend. 265 S.C. 253 (1975).

of the hearing."[18] In a telecommunications case involving a motion to strike witness testimony that included legal components, the Commission noted "although discussing some matters of law, [the witness] discusses the ultimate factual question in issue…" and distinguished it from a prior case in which a witness discussed the jurisdiction of the Commission, a matter of law. PSC Order 1999-665, Docket 1999-033-C, page 3. The Commission denied the motion to strike and allowed the testimony into evidence. The Order stated

> the Commission will be able to judge the credibility of the evidence, and afford it whatever weight we deem appropriate. We have the right to believe it in its entirety, believe portions of it, or reject it completely. We believe that is the best approach under the circumstances of this case.

That is also the best approach in this case- the Commission should deny the motion to strike so that it can review Mr. Hempling's testimony in light of all others presented and determine the weight it deems appropriate.

III. **DESC Also Wants to Strike Testimony That is Not Legal in Nature**

The entire premise of DESC's motion is that Mr. Hempling's testimony is legal in nature. However, much of the wholesale removal it requests is far from legal testimony.

In Part II.C.1, Mr. Hempling exposes how DESC has mischaracterized its proposal, making its electric service seem less expensive than it is. In Part II.C.1 of his testimony, he explains that DESC describes itself as proposing only a cost increase of $178 million when it is actually proposing a total cost of $2.3 billion. To counter this effort to misdirect, Mr. Hempling recommends that the Commission review the full $2.3 billion. In that discussion, Mr. Hempling does bring up law, but for a reason that favors the company: the prohibition against retroactive ratemaking precludes the Commission from revisiting specific approvals of expenditures already

[18] Id.

incurred.[19] But that prohibition, he explains, does not disable the Commission from applying the prudence standard to costs that have not been incurred. DESC's mischaracterizations of its own proposal are fair game for expert testimony and should not be struck.

Part II.C.2 of Mr. Hempling's testimony has no reference to law whatsoever. Mr. Hempling there shows that by likening a 7.75% increase to the CPI's 14% increase, DESC's Application and Mr. Blevins' Direct Testimony make an apples-oranges error. By exposing this departure from logic and forthrightness, Mr. Hempling helps the Commission avoid repeating that error.

Additionally, DESC's objections are selective. It moves to strike passages that hold the company accountable but leaves untouched passages citing law that favors the company. Part III.C of Mr. Hempling's testimony describes the "management prerogative doctrine," which limits regulators' authority to order operational changes. DESC has no objection to that "legal" discussion. DESC's selectivity is reason enough to reject its motion.

IV. **Conclusion**

The Department understands why DESC wants to suppress Mr. Hempling's testimony. He has offered the Commission tools to ensure accountability, while exposing DESC's efforts to avoid accountability. DESC is clearly uncomfortable with Mr. Hempling, one of the most experienced and respected thinkers on utility regulation. DESC should address its discomfort by confronting Mr. Hempling through cross-examination, not by denying the Commission his expertise.

Similarly, the Commission should take into consideration all of Mr. Hempling's testimony as it is properly submitted and relevant. As provided in the Rules of Evidence, the

[19] Hempling Direct at 25:8-15.

testimony will assist the Commission in understanding the evidence, determining facts, and deciding the ultimate issues in this matter. The Commission sits as both the judge and expert jury, with the roles to weigh the evidence and reach the ultimate conclusions on the matters presented. The Commission is legally authorized, obligated, and "entitled to hear testimony and give that testimony whatever weight it deems appropriate during the course of the hearing."[20] Therefore, the motion should be denied.

Respectfully submitted,

S.C. DEPARTMENT OF CONSUMER AFFAIRS

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[20] PSC Order 2009-104(A), Docket 2008-196-E, page 112

STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION
DOCKET NO. 2020-125-E

IN RE:	)	
	)	
APPLICATION OF DOMINION ENERGY SOUTH CAROLINA, INCORPORATED FOR ADJUSTMENT OF RATES AND CHARGES	)	**CERTIFICATE OF SERVICE**

I hereby certify I have caused to be served this day the **Response to Motion to Strike Testimony of Scott Hempling** upon the individuals listed below via electronic mail as follows:

chad.burgess@dominionenergy.com; abateman@ors.sc.gov; shamm@ors.sc.gov; chuber@ors.sc.gov; aknowles@ors.sc.gov; mwilloughby@willoughbyhoefer.com; belton.zeigler@wbd-us.com; kathryn.mansfield@wbd-us.com; manzelmo@mcguirewoods.com; matthew.gissendanner@dominionenergy.com; fknapp@knappagency.com; emily.w.medlyn.civ@mail.mil; alex@shissiaslawfirm.com; bguild@mindspring.com; dori.jaffe@sierraclub.org; adam@scjustice.org; seaton@spilmanlaw.com; dwilliamson@spilmanlaw.com; selliott@elliottlaw.us; john@johncoffman.net; klee@selcsc.org; cgrundmann@spilmanlaw.com

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December 10, 2020
Columbia, South Carolina